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# In the Supreme Court of the United States

OCTOBER TERM, 1927

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No. 175

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLE BERKENESS

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 69) is reported in 16 F. (2d) 115.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered November 15, 1926. (R. 70.) Petition for certiorari was filed January 31, 1927, and granted April 18, 1927 (R. 71) under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Has Section 17 of the Alaska Dry Law, in so far as it relates to the issuance of search warrants for private dwellings on proof that liquor is being kept therein, but without requiring proof of sales, been repealed or superseded by the search warrant provisions of Section 25, Title II, of the National Prohibition Act, which require that no dwelling shall be searched unless there is proof of sales? In other words, are the search warrant provisions of the Alaska Dry Law and the Alaska Code available to the Government in the enforcement of prohibition in Alaska?

## STATUTES INVOLVED

The principal statutes involved are set forth in an appendix to this brief.

## STATEMENT

This suit was brought May 6, 1925 (R. 6), in the District Court for the Fourth Division of Alaska, to abate a common and public nuisance maintained in respondent's dwelling at Fairbanks, Alaska, in violation of Sections 19 and 20 of the Act of February 14, 1917, c. 53, 39 Stat. 903, 907 (U. S. C., Title 48, Secs. 280, 281), commonly known as the Alaska Bone Dry Law.

The suit was based on information obtained under a search warrant issued May 5, 1925, by the United States Commissioner for the Fairbanks Precinct for the search of respondent's cabin located in the Town of Fairbanks, and for the seizure

of any liquor found therein. (R. 24.) The warrant was based upon three affidavits made by a deputy United States Marshal, and two prohibition agents, the affidavits alleging that intoxicating liquor was kept and stored in the building. (R. 17–22.) Under the terms of the Alaska Bone Dry law it is unlawful to keep intoxicating liquor in a dwelling, although not for sale, and under Section 17 of that law (unless it was repealed by the National Prohibition Act) a search warrant may issue to search a dwelling on proof that liquor is being kept therein, and without any proof of sales. The warrant was served by the deputy Marshal and a large quantity of intoxicating liquor and paraphernalia for its manufacture were seized. (R. 27–28.)

At the trial the Government offered testimony relating to the search and seizure and sought to introduce in evidence the search warrant, the supporting affidavits, and the Marshal's return thereon, with a view to showing that respondent had in his possession in the cabin 99 bottles of beer, 1 fifty-gallon barrel of wine, 1 fifty-gallon barrel of beer mash in the process of being manufactured, 1 eight-gallon still complete, together with other contraband property used in the manufacture and possession of intoxicating liquor, as shown by the inventory attached to the search warrant (R. 27–28), and that at the time of the seizure, and for a long period prior thereto, he had stored in the building and was then engaged in the manufacture therein

of intoxicating liquor in violation of the provisions of the Alaska Dry Law.

Respondent objected to the introduction of the evidence and submitted a petition for its suppression, which had previously been filed in the criminal case (R. 37), upon the grounds that the building in question was occupied by him as his residence; and, inasmuch as the search warrant and supporting affidavits did not show that the building was being used as a place for the sale of intoxicating liquor, the warrant was void (R. 19, 32, 39, 40).

The affidavits, the search warrant, and the complaint in the suit were all prepared and filed under the provisions of the Alaska Dry Law, and it was the Government's contention that the warrant was valid because under the local law it was unnecessary to allege or show in the affidavits for the warrant that the building described was being used for the sale of intoxicating liquor. (R. 51.)

The petition for the suppression of evidence was granted, the evidence offered by the Government excluded, and the suit dismissed. (R. 11.) The Government appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 58, 59), the assignments of error all being based upon the proposition that the search warrant provisions of the National Prohibition Act had not repealed or superseded those contained in the Alaska Dry Law (R. 54). The validity of the search warrant and the sufficiency of the supporting affidavits were never questioned upon any other ground. The Circuit Court

of Appeals affirmed the District Court's decree, the court holding that while "the affidavits were sufficient in their statement of facts to justify (sic) the terms of the Alaska prohibition act and to justify the issuance of the search warrant," Congress intended, when it enacted the National Prohibition Act, that the provisions contained therein for the search of private dwellings should occupy the ground fully and to the exclusion of local laws, such as the Alaska Dry Law. (R. 69, 70.)

The Government thereupon applied to this Court for a writ of certiorari, setting forth as grounds therefor that the failure of the court below to follow its prior decisions upon the subject had resulted in uncertainty as to the proper procedure to be followed in prohibition matters in Alaska, and that if the decision were allowed to stand it would not only deprive the Government of one of the most effective means of law enforcement in Alaska but would render many provisions of the Alaska Dry Law unenforceable and to that extent defeat the plain purposes of the Act. The writ was granted April 18, 1927.

## SUMMARY OF ARGUMENT

The court below erred in failing to follow the rule of statutory construction laid down in its prior decisions holding that the Alaska Dry Law, although containing more drastic provisions and severer penalties than those found in the National Prohibition Act was not repealed by the latter Act.

The National Prohibition Act contains no provisions expressly repealing the Alaska Dry Law, and repeals by implication are not favored. It repeals only such prior statutes as are inconsistent with its own provisions. As between the later enacted statute, the National Prohibition Act, and the prior specially enacted Dry Law for Alaska, no irreconcilable conflict or incompatibility can be found. Both may stand—one as a general law for the United States and the other as a special statute for Alaska. The Alaska Dry Law being a special statute, the presumption is, in the absence of an express repeal, that it was intended to remain in force as an exception to the later general provision of the National Prohibition Act.

In enacting the Alaska Dry Law, Congress was pursuing its policy of prohibition in the Indian country. Such statutes have always been regarded as special legislation, passed for a specific purpose. The Alaska Dry Law contains severer penalties and more drastic provisions than the National Prohibition Act. These were inserted to insure genuine prohibition and to afford protection to the Indians and white settlers of Alaska. In order that the purposes of the Act might be fully carried out, the search-warrant provisions had to be made as broad as the acts forbidden. With these more drastic provisions and the peculiar conditions of Alaska the restricted search-warrant provisions of the National Prohibition Act are wholly inadequate to

deal. There is therefore no inconsistency between the two statutes and no implied repeal.

Under the Alaska Dry Law and the Alaska Code no search warrant may issue except upon probable cause, the same as under the National Prohibition Act. Respondent was therefore deprived of no constitutional rights by the procedure in this case.

The Alaska Dry Law remains in force just as do the prohibition laws of the States, and the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaska statute than it does State laws. Congress evidently intended that both Acts should remain in full effect—one a special Act for Alaska, the other a general law for the United States as well as for the Territory of Alaska.

## ARGUMENT

### THE SEARCH WARRANT PROVISIONS OF THE ALASKA DRY LAW AND THE ALASKA CODE WERE NOT REPEALED OR SUPERSEDED BY THE NATIONAL PROHIBITION ACT

In *Abbate* v. *United States*, 270 Fed. 735, the court below held that the Alaska Dry Law, although containing more drastic provisions and severer penalties than those found in the National Prohibition Act, was not repealed by the latter Act. The court pointed out that in passing the National Prohibition Act Congress was adopting general legislation for the whole United States to carry out the provisions of the Eighteenth Amendment, while in enacting the Alaska prohibition statute it was legislating solely for that territory and adopting provisions

peculiarly applicable thereto. There can be no doubt, the court said, that the National Prohibition Act takes the place of prior general statutes of the United States so far as they are inconsistent therewith, but it does not follow that it repeals the express provisions of the local statute adopted expressly for Alaska. The court further held it is well settled that a law of a territory will subsist and be enforced concurrently with a general law applicable throughout the United States on the same subject. While the court did not make a ruling on search warrants, because that question was not before it, the opinion quoted the following well-known rule of statutory construction (p. 736):

> A general act repealing all acts that are inconsistent with its provisions will usually be construed to refer to general statutes alone and not to include special or local laws. * * *
>
> The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act, especially where both laws were enacted at the same time or are substantially contemporaneous. * * * Hence it is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of the earlier statute. * * *

The decision in the *Abbate case* was later affirmed by the court below in the following cases:

> *Koppitz* v. *United States*, 272 Fed. 96.
> *Simpson* v. *United States*, 290 Fed. 963.
> *Peterson* v. *United States*, 297 Fed. 1000.

In the last case the court said (p. 1001):

> The two laws, National Prohibition Act and Alaska dry law, are in force in Alaska, with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail.
>
> The fact that the penalties may be different for some of the offenses defined in the two acts does not affect the validity of the Alaska statute * * *.

When the court came to consider the instant case, however, it refused to follow its prior decisions on the subject. It completely discarded the rule of statutory construction adopted in previous cases and held that the purpose of Congress in enacting the search-warrant provisions of the National Prohibition Act was to cover that ground fully and to the exclusion of local laws on the subject, and that by its action Congress impressed a limitation on the right to search a dwelling which is available to the residents of Alaska equally with those in other portions of the United States.

The error of the court in reaching this conclusion may be demonstrated, we believe, by a consideration of the following propositions: (*a*) Special legislation is not repealed by general law; (*b*) the Alaska statute was enacted to deal with conditions

peculiar to that country, and (*c*) the constitutional rights of respondent were fully protected under the search warrant provisions of the Alaska Code.

(A) THE ALASKA DRY LAW BEING A SPECIAL STATUTE, THE PRESUMPTION IS THAT IT WAS INTENDED TO REMAIN IN FORCE AS AN EXCEPTION TO THE LATER GENERAL PROVISIONS OF THE NATIONAL PROHIBITION ACT

The National Prohibition Act of October 28, 1919, c. 85, 41 Stat. 305, is concededly a general statute of the United States. It contains no provisions expressly repealing the Alaska Law, and it is settled that repeals by implication are not favored. Such provisions as the National Prohibition Act does contain respecting repeals make against rather than for implied repeals. Section 35, Title II (U. S. C., Title 27, Sec. 52), provides in part:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

Section 19, Title III (U. S. C., Title 27, Sec. 89), contains similar provisions respecting alcohol. And Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), reads in part:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of

> such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act. * * *

The language of this Court in considering a statute containing a similar provision is applicable here. In *Henderson's Tobacco,* 11 Wall. 652, the question was whether the Act of July 20, 1868, imposing taxes on distilled spirits and tobacco, repealed the proviso to the 25th Section of the Internal Revenue Act of March 2, 1867, relied on by the claimants, which limited to twenty days the time for commencing proceedings to enforce forfeitures. The Act of 1868 contained a provision "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." In overruling the contention of the Government that the proviso relied on by the claimants was repealed by the Act of 1868, this Court said (pp. 656-657):

> If this is so, it was a repeal by implication only. That act contains no words expressly repealing either the act of 1867 or that of 1864, to which the one of 1867 was a supplement. On the contrary, the repealing clause, which it does contain, indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject-matter. The 105th section enacts, "that all acts and parts of acts inconsistent with the provisions of this act are hereby

repealed." This is an express limitation of the extent to which it was intended former acts should cease to be operative, namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law. In the *United States* v. *Tynen* [11 Wall. 88, 92], it was said by Mr. Justice Field, that "when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more

> than that the former statute is impliedly repealed, *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.

In the absence of specific provisions for repeal, a general statute will not nullify merely on the theory of repugnancy a prior existing one which is special, local, or particular, or which is limited in its application. Sutherland, Statutory Construction, 2nd Ed. (Lewis, 1904), Sec. 274.

In *State* v. *Stoll*, 17 Wall. 425, 431, this Court said:

> To justify this court in holding that the act passed in that year repealed or modified the sixteenth section of the charter of the bank in question, it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand.

And again (p. 436):

> The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case.

In *Rodgers* v. *United States*, 185 U. S. 83, 87, it was said:

> It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

In *Washington* v. *Miller*, 235 U. S. 422, this Court had under consideration the question of whether a subsequently enacted general statute repealed special provisions of a prior Act confining the descent and distribution of Creek land to citizens of the Creek Nation. After setting forth the subsequently enacted statute, this Court observed (pp. 427–428):

> No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any quali-

fication or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, Section 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both (*United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, *Id.* 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87–89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

Certainly as between the later enacted statute, the National Prohibition Act, and the prior specially enacted Dry Law for Alaska, no irreconcilable conflict or incompatibility can be found. Both may stand—one as a general law for the United States and the other as a special statute for Alaska. Any seeming incompatibility that may result from the differences in the penalties and search-warrant provisions, or other apparent inconsistencies, between the two Acts at once disappears when full recognition is given to the purpose and intent underlying each statute. Especially is this so when it is realized that the Alaska statute was enacted to cope with peculiar local conditions, with which the milder and more liberal provisions of the National Prohibition Act, as will be pointed out later, are wholly inadequate to deal. The purpose of inserting more drastic provisions in the Alaska law was to lessen the unusual dangers arising in such a vast unpeopled territory from a large unrestricted Indian population coming into even ordinary contact with caches of intoxicating liquor. Congress has long recognized the inflammable character of the Indian when liquor is left within his reach. The need for protecting the Indians as well as the white settlers of Alaska was as great when the National Prohibition Act was adopted, and is as necessary to-day, as when the Alaska Dry Law was enacted. In passing this law, Congress was merely pursuing a long-established governmental policy of prohibiting traffic in ardent spirits in the Indian country

among a primitive people for whose welfare, protection, and development the United States Government was responsible as guardian. Such statutes have always been regarded as special legislation, passed for a specific purpose, and restricted to a comparatively narrow field of operation. They are fundamentally unchanged by fluctuations in the policy or laws relating to the country in general. The Alaska statute is based on the theory of wardship and protection. The National Prohibition Act is founded on a distinctly moral and economic basis. Instead of being in irreconcilable conflict each statute is based on a separate and distinct governmental policy, and in order fully to carry out that policy it is necessary that both statutes be preserved.

B. THE ALASKA DRY LAW WAS ENACTED TO DEAL WITH CONDITIONS PECULIAR TO ALASKA

In reaching its conclusion, the court below said that under neither Act may intoxicating liquor be possessed without a permit. So, the court reasoned, it will not do to accept the argument that the search-warrant provisions of the National Prohibition Act have to do with conditions different and inapplicable to the enforcement of the Alaska Dry Law. In this, we believe, the court erred.

Not only may liquor be possessed under the National Prohibition Act in a private dwelling for certain purposes without a permit, which is not permissible under the Alaska statute, as will be pointed out later, but conditions in Alaska are dif-

ferent and the search-warrant provisions of the National Prohibition Act are wholly inadequate to the enforcement of the Alaska Dry Law, specially enacted to deal with those conditions. The purpose of the Alaska statute and the distinction between the two were well set forth by the court below in the *Abbate case*. Congress enacted the Bone Dry Law for Alaska and two years later it passed the National Prohibition Act. In enacting the latter, Congress was adopting legislation for the whole United States to carry out the provisions of the Eighteenth Amendment. In enacting the Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by the Act of July 27, 1868, c. 273, 15 Stat. 240, 241, Sec. 4 (Sec. 1955 R. S.), which empowered the President to prohibit the importation and use of distilled spirits into and within the Territory of Alaska, the population of which was then largely composed of Indians. That policy was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917.

By the Act of March 3, 1873, c. 227, 17 Stat. 510, 539, the provisions of the Act of June 30, 1834, c. 161, 4 Stat. 729, defining the boundaries of the Indian country were extended to Alaska. Whether Alaska is still Indian country within the definitions laid down by this Court is immaterial, because a large part of the population is still composed of

Indians and the sale of intoxicants to Indians there has been continuously prohibited. Later by the Act of May 17, 1884, c. 53, 23 Stat. 24, 28, Sec. 14, providing a civil government for Alaska, the importation, manufacture, and sale of intoxicating liquor in Alaska, except for medicinal, mechanical, and scientific purposes, were prohibited. While the latter provisions and those of Section 4 of the Act of July 27, 1868, *supra*, were repealed when the system of licenses was established for the sale of liquor in Alaska, the sale of liquor to Indians under the license system was forbidden. Act of March 3, 1899, c. 429, 30 Stat. 1253, 1338, Sec. 466, Title II; Sec. 142, Title I, amended February 6, 1909, c. 80, 35 Stat. 600, 603, Sec. 9 (Alaska Code, 1913, Secs. 2575, 2022).

Evidently the people of Alaska became dissatisfied with the liquor situation as it existed under the license system. That system afforded no protection against the traffic in liquor among the Indians by the bootlegger. Because of the limitations, however, which the Act of August 24, 1912, c. 387, 37 Stat. 512, 514, Sec. 9 (U. S. C., Title 48, Sec. 77), placed upon the power of the legislative assembly with respect to the control of the liquor traffic, it was deemed doubtful whether that body could fully deal with the subject. So the assembly passed an Act in 1915 submitting to the voters of Alaska the question whether they desired prohibition in the Territory after January 1, 1918. The vote was car-

ried by a large majority. House Report No. 1357, 64th Cong., 2nd Sess. It was in pursuance of this vote that the so-called Alaska Dry Law was passed.

That Act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offenses, than do the provisions of the National Prohibition Act. For instance, the penalty provided for manufacturing, selling, transporting, or possessing under the Alaska Act (Sec. 1) is $1,000 fine or a year's imprisonment, or both. Under the National Prohibition Act (Sec. 29, Title II) the penalty for manufacturing or selling, for a first offense, is $1,000 or six months' imprisonment, while for transporting or possessing, for a first offense, it is only $500 fine.

That Congress intended to enact a statute dealing with conditions peculiar to Alaska is shown not only by the more drastic provisions and the severer penalties contained in the Alaska Act, but also by the debates in Congress on the bill, where it was explained that its provisions, while somewhat drastic, were intended to afford genuine prohibition so as to protect the inhabitants of that country, a large part of whom consisted of Indians. (Cong. Rec., Vol. 54, pt. 3, pp. 2519-2524.) Mr. Wickersham, delegate from Alaska and author of the bill, stated on the floor of the House that the bill was drawn in response to a vote of the people of Alaska for dry legislation; that there were about 50,000 white people and from 25,000 to 30,000 Indians in

Alaska; that bootleggers were selling liquor throughout the Territory; and that if even a small quantity of liquor were permitted on one's person or in his cabin to be traded off to an Indian or white person, the bill might as well not be passed.

Representative Houston, who reported the bill from the Committee on the Territories, explained the purpose of the bill and the Alaskan situation as follows (Cong. Rec., *supra*, p. 2520):

> It is a bill to prevent the manufacture and sale of intoxicating liquors in the Territory of Alaska. I believe that this bill will accomplish that purpose. I believe it will prevent the manufacture and sale, and that is a very important thing for that Territory. Its provisions may be considered drastic somewhat, but they are complete and ample to carry out the purposes of real and genuine prohibition. * * *
>
> A very large number of the inhabitants of the Territory of Alaska are Indians, almost half of them—not half now, but up to two or three years ago about half—a people that it was thought needed the benefit of prohibitory laws more especially than did the white people, just as it was considered by this Government and by Congress that the Indians who lived in the Indian Territory needed drastic provisions and stricter regulations to prevent them from having liquor, and Congress did prevent liquor going in there. These people are up there and they are at the mercy of the liquor seller, including the blind tiger and the wildcatter, and

> this bill seeks to so fix it and safeguard it that these methods shall cease, so that the Indians can not be victimized and wronged as they have been to such a great extent by those who for the mere love of money and the profit they can make have been willing to make brutes and beasts of the native Indians for the lucre they got out of it.

Having so recently considered conditions in Alaska and adopted legislation deemed suitable for that Territory, it is not likely that Congress, when it came to adopt the National Prohibition Act, would have changed its views in regard to the need for the drastic provisions which it had inserted in the Alaska law. Section 17 of the latter Act is broader in scope than Section 25, Title II, of the National Prohibition Act. It permits the issuance of a warrant for the search of a dwelling or other building upon a charge of "manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor," while Section 25 of the National Prohibition Act provides for the search of a private dwelling only upon evidence of sale. Obviously the purpose of inserting broader search-warrant provisions in the Alaska Act was to afford effective means for enforcing the drastic provisions of that Act. And since Section 17 is broader than Section 25 there is no conflict between the two provisions within the meaning of Section 35, Title II, of the

National Prohibition Act and Section 5 of the Supplemental Act, and therefore no ground for holding that by the later enactment of Section 25 Congress intended to impress a limitation upon the right to search a private dwelling in Alaska.

As pointed out above, the court's decision was partly based upon the erroneous assumption that under neither Act may intoxicating liquor be possessed without a permit. Section 33, Title II (U. S. C., Title 27, Sec. 50), of the National Prohibition Act provides that one may possess liquors without a permit in his private dwelling so long as such liquors are for use only for the personal consumption of the owner, his family, and bona fide guests. Such liquors, however, may not be sold. It is readily apparent therefore why Congress limited a warrant for the search of a private dwelling under the National Prohibition Act to evidence of sale. But no such provision is found in the Alaska statute. Under it no liquors may be possessed in a private dwelling or elsewhere for any purpose without a permit. Necessarily, in order that all the provisions of that statute could be enforced, the search-warrant provisions had to be made as broad as the acts forbidden. This Congress attempted to do in Section 17. It made no distinction between private dwellings and other buildings. To hold that said section has been repealed and thus restrict warrants for the search of dwellings to evidence of sale only would leave many offenses unpunished.

Evidence of sale is, of course, harder to obtain and not as readily discoverable as the odor arising from and the paraphernalia used in the manufacture of liquor in small cabins, where most of the manufacturing in the inland sections is carried on. Many of the drastic provisions of the Act would accordingly be defeated. The manufacturing, storage, use, and exchange of alcoholic liquors in a private dwelling, although forbidden by the Act, could be carried on with impunity and no search warrant could issue to secure evidence on which to base a prosecution unless there was also a sale. Obviously this can not have been the intent of Congress. It is not in keeping with the purpose to provide genuine prohibition for Alaska. The circumstances and conditions of this legislation make perfectly clear what Congress intended. It did not intend by the later enactment to legalize acts it had previously forbidden, or to take away from the Government any means for punishing those acts.

(C) THE CONSTITUTIONAL RIGHTS OF RESPONDENT WERE FULLY PROTECTED UNDER THE SEARCH-WARRANT PROVISIONS OF THE ALASKA CODE

At the time of the passage of the Alaska Dry Law there was in effect in Alaska a complete procedure for the issuance and service of search warrants and seizures thereunder. (Chap. 38, Title XV, Comp. Laws Alaska, 1913.) Section 17 of the Alaska Dry Law provides that if one or more per-

sons who are competent witnesses shall charge on oath or affirmation before the District Attorney that any person is violating or has violated any of the provisions of that Act, the District Attorney shall cause a warrant to be issued for the search of the "said described room, house, building, or other place, and the appurtenances thereof." Section 23 (U. S. C., Title 48, Sec. 284) provides that there shall be no property right in alcoholic liquors illegally manufactured, possessed, or stored under the Act, and that they may be searched for and seized and destroyed after a conviction. No specific provision governing the issuance of search warrants was made by the Dry Law, but it undoubtedly was intended that the procedure outlined in the Alaska Code should be followed in procuring warrants under Section 17 of the Dry Law, and it was generally so held before the enactment of the National Prohibition Act. Section 2488 of the Alaska Code provides:

> That a search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched.

This is practically the same language as that contained in Section 3, Title XI, of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 228 (U. S. C., Title 18, Sec. 613), which was incorporated into the National Prohibition Act, Section 25, Title II. It will thus be seen that under the Alaska Law no

warrant may issue for the search of a private dwelling except upon probable cause, the same as under the National Prohibition Act. The rights of the accused therefore are fully protected, since the statute carries out the intent of the Fourth Amendment and the decisions of this Court thereunder.

On the whole, we are unable to find any reason for contending that the search-warrant provisions of the National Prohibition Act are inconsistent with or that they repeal Section 17 of the Alaska Dry Law. Under the Alaska Law the possession of intoxicating liquor in a dwelling is illegal and there is no exception as under Section 33, Title II, of the National Prohibition Act. Under the Alaska Law a search warrant will issue for any building where intoxicating liquor is manufactured, stored, or possessed, and there is no restriction in regard to searches of private residences as under the National Prohibition Act. The only reason which can be offered why there is a restriction under the National Prohibition Act is because, as above pointed out, intoxicating liquor can be lawfully stored and possessed in a private dwelling under certain circumstances set forth in the National Prohibition Act. There is just as much reason for keeping the search-warrant provisions of the Alaska law in force as there was for upholding the penalty provisions in the *Abbate case*.

True, the Organic Act creating a territorial assembly for Alaska provides that the Constitution

of the United States, and all laws thereof which are not locally inapplicable, shall have the same force and effect within the Territory as elsewhere in the United States. Comp. Law of Alaska, 1913, Section 410. (U. S. C., Title 48, Sec. 23.) But this provision is incorporated in the Organic Acts of all Territories. It is simply an extension of the laws of the United States to the Territories. As pointed out by the court below in the *Abbate case*, it does not stand in the way of or affect the construction of special congressional legislation enacted solely for the Territories. In the *Abbate case* it was held that the provision of the National Prohibition Act for the punishment for selling liquor in Alaska "is wholly inapplicable" there, because Congress has provided a severer penalty for the act when committed in Alaska. If this is so, there would seem to be no reason why the search-warrant provisions of the National Prohibition Act should not be held locally inapplicable in Alaska, since Congress has provided more liberal search-warrant provisions for the detection and prosecution of crime when committed there. But whether the search-warrant provisions of the National Prohibition Act may be regarded as locally inapplicable or not, we submit that they were not intended to be exclusive or to repeal the Alaska law upon the subject.

The cases of *Vigliotti* v. *Commonwealth of Pennsylvania*, 258 U. S. 403, and *Kennedy* v. *United States*, 265 U. S. 344, are in point. In the former

this Court held that a State law of May 13, 1887, known as the Brooks Law, which prohibited the sale of spirituous liquor without a license, was not at variance with but rather in aid of the provisions of the Eighteenth Amendment and the National Prohibition Act, and was not superseded by them. In the latter, it was held that the portion of the Act of July 23, 1892, as amended, which made possession of intoxicating liquor in the Indian country an offense and fixed its punishment, was not repealed, superseded, or modified by the National Prohibition Act. This Court said (p. 345):

> The evils aimed at are those which result from liquor traffic in localities where Indians live or which they are liable to frequent. These statutes apply locally for the special purpose of keeping whiskey and other intoxicants out of the reach of Indians.

**CONCLUSION**

We think that the Dry Law of Alaska remains in force just as do the prohibition laws of the States, and that the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaska statute than it does the State Acts. It apparently was the intention of Congress that both Acts should remain in full effect—one a special Act for Alaska and the other a general law for the United States, as well as for the Territory of Alaska.

The decree of the court below should be reversed.

Respectfully submitted.

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SEPTEMBER, 1927.

# APPENDIX

For the convenience of the Court the following statutes are set forth below:

## ALASKA DRY LAW AND ALASKA CODE

Section 1 of the Alaska Dry Law (Act of February 14, 1917, c. 53, 39 Stat. 903, U. S. C., Title 48, Sec. 261) reads as follows:

> That on and after the first day of January, anno Domini nineteen hundred and eighteen, it shall be unlawful for any person, house, association, firm, company, club, or corporation, his, its, or their agents, officers, clerks, or servants, to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the Territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the Territory of Alaska unless the same was procured and is so possessed and transported as hereinafter provided.
>
> Whenever the term "liquor," "intoxicating liquor," or "intoxicating liquors" is used in this Act it shall be deemed to include whisky, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, and all malt liquors, including all alcoholic compounds classed by the United States Internal Revenue Bureau as "compound liquors": *Provided*, That this Act shall not apply to methyl or wood alcohol.

That any person or persons, or any house, company, association, club, or corporation, his, its, or their agents, officers, clerks, or servants, who shall, directly or indirectly, violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $1,000 or shall be imprisoned for a period of not more than one year, or by both such fine and imprisonment.

Section 17 (U S. C., Title 48, Sec. 278), providing for search warrants, reads:

That if one or more persons who are competent witnesses shall charge, on oath or affirmation, before the district attorney or any of his deputies duly authorized to act for him, presenting that any person, company, copartnership, association, club, or corporation has or have violated or is violating the provisions of this Act by manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor, shall request said district attorney or any of his assistants duly authorized to act for him to cause to be issued a warrant, said attorney or any of his assistants shall cause to be issued such warrant, in which warrant the room, house, building, or other place in which the violation is alleged to have occurred or is occurring shall be specifically described; and said warrant shall be placed in the hands of the marshal, his deputy, or any town marshal or policeman in any town in which the room, house, building, or other place above referred to is located, commanding him to at once thoroughly search said described room,

house, building, or other place, and the appurtenances thereof; and if any such be found, to take into his possession and safely keep, to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all the paraphernalia or part of the paraphernalia of a barroom or other alcoholic liquor establishment, and any United States internal-revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor, effective for the period of time covering the alleged offense, and forthwith report all the facts to the district attorney or his deputy, and such alcoholic liquor or the means for dispensing same, or the paraphernalia of a barroom or other alcoholic liquor establishment, or any United States internal-revenue tax receipt or certificate for the sale of alcoholic liquor, effective as aforesaid, shall be prima facie evidence of the violation of the provisions of this Act.

Section 2488 of the Alaska Code (Comp. Laws of Alaska, 1913) provides:

> That a search warrant can not be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched.

Sections 19 and 20, the nuisance provisions of the Alaska Dry Law, read:

Section 19 (U. S. C., Title 48, Sec. 280):

> That all houses, boats, boathouses, buildings, clubrooms, and places of every description, including drug stores, where alcoholic liquors are manufactured, stored, sold, or vended, given away, or furnished contrary

to law, including those in which clubs, orders, or associations sell, barter, give away, distribute, or dispense intoxicating liquors to their members by any means or device whatever, as provided in this Act, shall be held, taken, and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others, in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to the penalties prescribed in section one of this Act, and judgment shall be given that such house, boat, building, or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquor contrary to law, as the court may determine.

Section 20 (U. S. C., Title 48, Sec. 281):

That any United States district attorney for the Territory of Alaska may maintain an action in equity in the name of the United States to abate and perpetually enjoin such a nuisance as defined in the preceding section. No bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt by a fine of not more than $500 or by imprisonment in the Federal jail for not more than six months, or both such fine and imprisonment, in the discretion of the court.

NATIONAL PROHIBITION ACT AND SUPPLEMENTAL ACT

Section 35, Title II, of the National Prohibition Act of October 28, 1919, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, Sec. 52), provides, with respect to repeals, as follows:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. * * *

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), relating to repeals, provides:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act * * *.

Section 25, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 39), the search warrant provision, reads:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so un-

lawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. * * *

Section 33, Title II, of the same Act (U. S. C., Title 27, Sec. 50), permitting possession for certain purposes, provides:

After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein * * *.

Section 3 of the Supplemental Act (U. S. C., Title 27, Sec. 2) reads:

> That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands * * *.

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